

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 99-195

STATE OF MONTANA,

Plaintiff and Respondent,

v.

MERLIN LaDUE,

Defendant and Appellant.

BRIEF OF RESPONDENT

On Appeal from the Montana Second Judicial District Court, Silver Bow County
The Honorable John W. Whelan, Presiding

APPEARANCES:

JOSEPH P. MAZUREK
Montana Attorney General
PAMELA P. COLLINS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ROBERT McCARTHY
Silver Bow County Attorney
BRAD NEWMAN
SAMM COX
Deputy County Attorneys
155 West Granite Street
Butte, MT 59701

ATTORNEYS FOR PLAINTIFF
AND RESPONDENT

WILLIAM F. HOOKS
Attorney at Law
Appellate Defender Office
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEY FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it denied LaDue's motion, made after the trial had begun, to call two additional witnesses?
2. Even assuming arguendo that the court erred, has LaDue demonstrated that his substantial rights were prejudiced?

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case provided by the Appellant.

STATEMENT OF THE FACTS

Owen Ah-Mu testified that in the hours preceding the stabbing on the evening of June 10, 1998, he was drinking beer with his best friend, Dale Abad, and the appellant, Merlin LaDue, at LaDue's house on Locust Street. (Tr. at 188-89, 217.) Ah-Mu decided he wanted to go to the apartment of his brother, Alipati, on Evans Street. (Tr. at 188-91.) LaDue's girlfriend, Carolyn Jaquez, gave the three men a ride to Alipati's after Ah-Mu agreed to pay Jaquez \$2 for gas. (Tr. at 191-92.) As Ah-Mu entered Alipati's apartment, Alipati saw that Abad and LaDue were pushing and shoving each other and he told Ah-Mu that it looked as though they were about to fight. (Tr. at 193, 195, 210.) Ah-Mu walked outside, he saw that LaDue had a knife and yelled a warning to Abad. (Tr. at 196-97.)

Ah-Mu pushed Abad away, stood in front of LaDue, and, pushing him, told him he had better leave. LaDue, however, did not leave. He pushed Ah-Mu twice; Ah-Mu grabbed him by the throat and bent him over the fence. LaDue "pushed" Ah-Mu twice more on the chest. Ah-Mu became numb and was then aware he had been stabbed. He passed out on the sidewalk. (Tr. at 197-99, 213, 219.)

Owen Ah-Mu testified that he did not have a weapon and he did not see Abad with a weapon. Ah-Mu did not threaten or punch LaDue. (Tr. at 199-202, 219.)

Alipati Taufagu, Ah-Mu's brother, testified that he saw LaDue and Abad pushing each other outside. He then saw LaDue and Ah-Mu in a heated verbal exchange and saw them push each other. After LaDue hit Ah-Mu four to six times in the stomach and chest, Ah-Mu grabbed LaDue by the neck or coat and moved back, trying to keep LaDue away from him. (Tr. at 234-35, 247-49.) LaDue, however, kept coming forward toward Ah-Mu. (Tr. at 236, 247.) LaDue then ran away and took off in a car. Ah-Mu lay on the sidewalk, blood spurting from his wound. (Tr. at 234, 237-38.)

Rose Lakel, Alipati's fiancée, also saw LaDue hitting Ah-Mu in the upper body and saw Ah-Mu trying to push LaDue away with his hand. (Tr. at 252.) Lakel, who worked with LaDue, identified LaDue to police officers, and also described the car. (Tr. at 254, 262-63.)

Carolyn Jaquez, LaDue's girlfriend and the mother of his child, testified that Ah-Mu asked her to give him a ride from her home on Locust Street to Evans Street. Jaquez agreed after Ah-Mu said he would pay her \$2 for gas. She gave LaDue, Abad, and Ah-Mu a ride to Evans Street. (Tr. at 291, 294.) After Abad and Ah-Mu exited the car and walked away, she informed LaDue that she had not received the \$2. LaDue got out of the car and asked Abad for the money, who said he didn't have any. Ah-Mu was in Alipati's apartment. (Tr. at 296-97.) Ah-Mu and LaDue walked toward each other. Ah-Mu screamed, "What about your knife?" They shoved each other and Ah-Mu tried to grab LaDue by the shirt collar or neck. (Tr. at 298-300.) When Jaquez saw LaDue twice punch Ah-Mu with a closed fist, she got out of her car. (Tr. at 300.) LaDue entered the car and told Jaquez to get back in and drive away. LaDue was holding a bloody knife and had blood on his hands. (Tr. at 302-03, 319.) LaDue told Jaquez, "I think I stabbed him. I think I killed him." (Tr. at 305.) LaDue threw something out of the car as they went over the Oregon Avenue overpass. (Tr. at 304.) When they arrived at their house on Locust Street, LaDue ran inside, tore off his clothing, and jumped into the shower. (Tr. at 306, 326.)

Debbie Dobb, a nurse by profession, testified that she lived in and was the assistant manager of the apartment building on Evans Street. (Tr. at 329-30, 339.) Dobb saw Ah-Mu exit a car and walk toward apartment E-2. Two men remained

near the car and began arguing. Ah-Mu came back toward the two men and stepped between them. (Tr. at 335-36.) Ah-Mu grabbed LaDue by the shirt, trying to hold him back. It did not appear that LaDue was trying to get away from Ah-Mu. Rather, it appeared that LaDue was leaning forward toward him. Dobb went to call the police. When she returned, she saw LaDue enter a car, which took off at high speed. (Tr. at 337-38, 345-47.) Ah-Mu was on his knees. Rose Lakel approached Ah-Mu and said he had been stabbed. Dobb called 9-1-1 and went down to the sidewalk to help him. (Tr. 337.)

Regina Tracy, a friend of Debbie Dobb's, lived in the Evans Street apartment building. Tracy saw two people arguing and then saw LaDue punch Ah-Mu. She saw blood and saw LaDue jump into a car, which left very quickly. Tracy never saw Ah-Mu strike LaDue. It appeared to her that LaDue was the aggressor, not Ah-Mu. (Tr. at 353, 360-61, 369-70.)

Michael Moore testified that he lived at the Evans Street apartments on June 10, 1998. On that date, he noticed three men get out of a car, holding beers. Ah-Mu went into Alipati's apartment and the other two men started arguing. Ah-Mu returned and tried to break up the argument by positioning himself between the two men. Ah-Mu told LaDue to back off and go away. LaDue, however, stood his ground and did not try to leave. LaDue hit Ah-Mu twice. LaDue stood

still for a second and then entered a car, which took off very quickly. Moore never saw Ah-Mu push or hit LaDue. (Tr. at 374-82.)

Officer Eric Steppe testified that on June 10, 1998, at approximately 7:15 p.m., he responded to a call from an apartment complex on Evans Street. Owen Ah-Mu was lying on the sidewalk, bleeding. Officers Steppe and Jerrod Hardy were told by witnesses that Merlin LaDue was the attacker and that he had fled, possibly to Locust Street, in a brown and tan Ford vehicle driven by a woman. At the scene of the stabbing, Steppe talked to witnesses Rose Lakel, Debbie Dobb, Dale Abad, and Regina Tracy. Steppe followed Ah-Mu to St. James Hospital and took photographs of his stab wounds. (State's Exs. 2, 3 A-D.) (Tr. at 103, 105-07, 109-12, 133-34.)

At the residence on Locust Street, Carolyn Jaquez told officers that LaDue had been there but had left. The officers observed that the shower had recently been used and clothes matching those worn by LaDue at the time of the stabbing were being washed in the washing machine. In the kitchen, Officer Hardy saw an open trap door leading to the basement. (Tr. at 134-38.) The officers descended to the basement and saw LaDue crawling through a hole in the foundation which led outdoors. Officer Hardy apprehended LaDue, who was wearing only a pair of gym shorts, by pulling him out of the hole. (Tr. at 138, 147, 162.) Officers found blood on the passenger side door frame and on the dashboard of the brown Ford

vehicle, which was parked behind the residence on Locust Street. (Tr. at 134, 153-54.)

Detective Sergeant Stradinger testified that when LaDue was apprehended, he said, "All it was was a street fight," and that all they were doing was having a knife fight. (Tr. at 176-77.) Stradinger did not notice any marks on LaDue's neck. He saw an abrasion on LaDue's arm which probably occurred when the officers pulled him through the hole in the basement foundation. (Tr. at 186-87.) The next day, Carolyn Jaquez took Stradinger to the area where LaDue threw the knife out of the car window. Stradinger located the knife, which had blood on it. (State's Ex. 1.) (Tr. at 178-79, 182.)

Dr. Clyde Hanson testified that he was an emergency room physician who had treated Owen Ah-Mu for two stab wounds and for abrasions. Ah-Mu had lost a significant amount of blood and was in mortal danger. The stab wounds were located in the upper left chest and the left neck. A CAT scan revealed the knife came very close to the carotid artery and jugular vein, which are major blood vessels. Even a small puncture of those vessels would result in death within minutes from blood loss. The direction of the wounds was downward. (Tr. at 282-87.) Treating radiologist Dr. Michael Driscoll testified that the stab wound was one centimeter from the carotid artery, which provides the primary blood supply to the brain. (Tr. at 126.)

Detective Sergeant Mark St. Pierre testified that he took statements from several witnesses including Owen Ah-Mu, Carolyn Jaquez, Rose Lakel, Alipati Taufagu, Dale Abad, Michael Moore, Debbie Dobb and Regina Tracy. He interviewed Debbie Dobb on June 12 at her workplace at the Red Cross. He interviewed Regina Tracy on June 12 at her workplace at John's Porkchop. (Tr. at 404, 406, 428-29.) No one St. Pierre interviewed said that Ah-Mu had any type of weapon; no one told him that Ah-Mu was the aggressor or that Ah-Mu threw any punches at LaDue; and no one told him that it appeared that LaDue was trying to defend himself. LaDue's booking photograph did not show any sign of injury to his face or neck. (Tr. at 417-18, 434.)

Merlin LaDue testified on his own behalf. When they arrived at the Evans Street apartments, Ah-Mu immediately walked to Alipati's apartment. LaDue also approached Alipati's apartment to get the gas money. Abad "got in [LaDue's] face," telling him that he could not go to Alipati's and to leave. LaDue became angry because Abad did not understand that LaDue did not want to remain there but he only wanted the gas money. LaDue told Abad to get out of his way and they grabbed each other by their shirts and pulled at each other. (Tr. at 457-58, 470.) Ah-Mu walked over and asked if there was a problem. When Ah-Mu was two feet away, LaDue moved away from Abad and pulled out his knife. LaDue opened it, showed it to Abad and Ah-Mu, and put it into his pocket, hoping to

scare them. (Tr. at 458-59, 472-73.) Ah-Mu stepped near his face, pointed, and said, "What about your knife, bitch. What about your little knife, punk." (Tr. at 460.)

In a statement written by LaDue (State's Ex. H), LaDue said that Ah-Mu stepped between him and Abad and told LaDue to leave or he would beat him up. LaDue, however, told Ah-Mu that he wanted his gas money. (Tr. at 474-76.)

LaDue testified that the fence was a foot behind him and he stepped back to leave, but that Ah-Mu grabbed him by the throat and pushed him back against the fence, saying he would kill him. LaDue said Ah-Mu grabbed his throat so hard he could not breathe. LaDue admitted, however, that it left no marks on him. LaDue reached in his pocket, pulled out his knife, and stabbed Ah-Mu twice. As Ah-Mu let go of him, LaDue ran, jumped into Jaquez's car, and told her to drive away. LaDue told Jaquez that he had stabbed Ah-Mu and thought he had killed him. LaDue saw a lot of blood on his hands. (Tr. at 460-62, 485-86.)

LaDue testified that on the way to Locust Street he threw the knife out of the car window because he did not want the police to find it. When he arrived at his residence, he washed his hands, got in the shower, and put his clothes in the washer, to remove the blood. LaDue planned to pack his clothes and get out. The police, however, arrived sooner than he had expected. He tried to escape from them by going into the basement and using the escape route. (Tr. at 463-64, 483.)

LaDue testified that he intended to stab Ah-Mu twice. It was not an accident. He was aiming for Ah-Mu's shoulder. (Tr. at 477.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it denied LaDue's motion to call two additional witnesses after the trial had begun because LaDue failed to demonstrate good cause. Tracy's and Dobb's conversation was not significant because their trial testimony substantially conformed to their prior statements. Even assuming arguendo that the court erred, LaDue has failed to sustain his burden to show that his substantial rights were prejudiced. The excluded evidence would not establish the requirements for the affirmative defense of self-defense, i.e., that Ah-Mu was the aggressor and that LaDue used reasonable force. LaDue was not deprived of a fair trial by the exclusion of the evidence. The evidence of LaDue's guilt was overwhelming and, therefore, any error was harmless.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LADUE'S MOTION DURING TRIAL TO CALL TWO ADDITIONAL WITNESSES.

A. Standard of Review

The standard of review of evidentiary rulings is whether the district court abused its discretion. State v. Gollehon, 262 Mont. 293, 864 P.2d 1257, 1263 (1993). Whether to allow a party to call unnamed witnesses is within the district court's discretion and will not be set aside absent a showing of a clear abuse of that discretion. State v. Wells, 202 Mont. 337, 658 P.2d 381, 386 (1983); State v. Booke, 178 Mont. 225, 583 P.2d 405, 409 (1978).

In criminal cases, no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant. When the record is sufficient to establish the guilt of the defendant, a new trial will not be ordered, even though there was error, unless it clearly appears that the error complained of actually impaired the defendant's right to a fair trial. State v. Huerta, 285 Mont. 245, 947 P.2d 483, 487 (1997); Mont. Code Ann. § 46-20-701.

Prejudice will not be presumed. This Court has stated that the defendant bears the burden of demonstrating that he was denied a substantial right from which the law imputes prejudice. State v. Huerta, 947 P.2d at 487, 489 (appellant

has the burden to demonstrate how the error adversely affected the outcome of his trial); State v. Soraich, 1999 MT 87, ¶ 20, 294 Mont. 245, 979 P.2d 206 (appellant has the burden to demonstrate the violation of a substantial right); see also State v. Carter, 285 Mont. 449, 948 P.2d 1173, 1180 (1997) (appellant carries the burden of establishing error by the trial court); cf. Chapman v. California, 386 U.S. 18, 21 (1967) (“The application of a state harmless error rule is, of course, a state question where it involves only errors of state procedure or state law”).

Montana Rule of Evidence 102 provides that error may not be predicated upon a ruling that excludes evidence unless an offer of proof was made whereby the substance of the evidence was made known to the court and a substantial right of the party is affected.

The defense of justifiable use of force is an affirmative defense and the defendant has the burden of producing evidence sufficient to raise a reasonable doubt of his guilt. See Mont. Code Ann. § 45-3-115; State v. Grady, 166 Mont. 168, 531 P.2d 681, 684 (1975). To establish a defense of justifiable use of force, the defendant must prove: (1) that the defendant was not the aggressor; (2) that the defendant reasonably believed that he was in imminent danger of unlawful harm; and (3) that the defendant used reasonable force necessary to defend himself. State v. Arlington, 265 Mont. 127, 875 P.2d 307, 318 (1994). Whether the force used was reasonable under the circumstances is a factual determination

within the province of the jury. State v. Gonzales, 278 Mont. 525, 926 P.2d 705, 711 (1996).

B. Background

After Debbie Dobb testified, the court ordered that a short recess be taken. (Tr. at 352.) Regina Tracy was then called as a witness by the State. During Tracy's cross-examination, the following transpired:

Q. [MR. McGEE] Have you talked with anyone about your testimony today?

A. Debbie Dobb.

Q. Did you talk with Mr. Ah-Mu?

A. No.

Q. When you were sitting in the hallway yesterday, did you have an opportunity to talk with Mr. Ah-Mu about the statement?

A. No.

Q. You don't recall Mr. Ah-Mu telling you to keep the story straight so you could get Merlin?

A. No.

Q. When was the last time that you talked to Debbie Dobb about this statement, about your statement here?

A. Just this morning.

Q. Did you talk to her in the bathroom a few moments ago?

A. Yeah.

Q. And you were told to stick to the story; is that correct?

A. No.

Q. That Mr. LaDue was guilty and stick to the story?

A. No. I said he – I mean, we all seen him – seen what happened. I did not – I was not told to stick to the story because there is no story.

(Tr. at 364-65.)

Michael Moore and Detective Sergeant St. Pierre proceeded to testify for the State and the State rested its case. The defense then requested that it be allowed to call two additional witnesses as follows:

MR. McGEE: [B]ased on what has happened in the hallways and in the bathroom today, I would like to ask the Court for leave to allow two more witnesses to be brought forward, my legal – paralegal here and Miss Caroline Jaquez, who overheard witnesses discussing the case, and it goes towards the truthfulness and intent of the witnesses.

....

MR. NEWMAN: [I]n response to the two additional potential witnesses that Mr. McGee has identified, the State has a couple of concerns.

One, Mr. McGee's paralegal is an agent of Mr. McGee's law office. I know that Mr. McGee cannot become a witness in a case that he is representing the Defendant on. Because of that agency relationship, because of that work relationship, I'm not confident that his paralegal can basically step outside those boundaries and act as a fact witness in this case either.

With respect to the other potential or proposed witness, Miss Jaquez was a witness in this case.

MR. McGEE: Excuse me, Brad. It's Caroline Jaquez, which is the mother.

MR. NEWMAN: Caroline Skinner?

....

MR. McGEE: Yes, Caroline Skinner.

MR. NEWMAN: I don't have any particular problem with Caroline Skinner, other than we would like to know what the basis of her testimony is. We would also like to know how long she's been sitting in the courtroom listening to these other witnesses.

THE COURT: She's been here for the whole trial.

MR. NEWMAN: And Mr. McGee, through his own motion, excluded witnesses. I don't know how she can listen to all the testimony and then come in and say that she knows something about the credibility of one of our witnesses.

For both those reasons, I don't think this is proper.

THE COURT: Yeah.

MR. McGEE: Your Honor, this involves an overheard conversation in the bathroom regarding witnesses fixing their testimony-type deal instead of having to defend those sorts of credibility and type of impeachment process, Your Honor.

I had no knowledge of it until right before – right after the last break regarding this, Your Honor. And I believe it's important for the jury to judge the credibility of the two independent witnesses here.

THE COURT: I have a real problem with this, counsel, because this woman is not an independent witness in the sense that if she were going to testify, she would have been excluded from the courtroom. She has heard all of the testimony. She's out mingling with other witnesses out there. The Court has no way of knowing what was said between her and someone else or if she only overheard

or what was – anything about it, and I’m reluctant to allow her to testify at this time because of that fact.

I find, if your paralegal was also in a similar position, she should have commented to people at the time, you know, you are not to talk; you are not to do this. If she’s sitting here as an extended officer of the court, she knows that she can’t – we’ve already instructed all of the parties as to how they’re going to perform, behave, et cetera.

Unfortunately, the witnesses weren’t told out there, but these people in here were told and obviously they didn’t follow the instructions of the Court. And I’m not going to allow them to come in and testify now, so your motion to call additional witnesses are denied.

....

MS. CRAMER: And I did respond to them, Judge. I did say that they are not to discuss it. . .

Your honor, after I did make the statement to the two ladies, I did immediately come back in and let Mr. ---

....

Oh, I was already in the bathroom. They were waiting.

....

THE COURT: . . . I’m going to think about it through the lunchtime.

(Tr. at 436-441.)

Following the lunch recess, the court ruled as follows:

THE COURT: . . . [T]his is concerning the motion to add additional witnesses. And after giving it careful consideration through the lunch hour, the information was furnished to Counsel prior to these witnesses testifying and he interrogated the witnesses concerning whether or not they discussed their testimony with another witness out in the hall, which they admitted they had, and that their testimony hadn’t varied from the written statements that they had given earlier, within the confines of the questions and answers

that were asked by counsel for the State and for the defense. Therefore, I'm denying the request for additional witnesses to be added on behalf of the defense.

(Tr. at 442.)

C. Discussion

Mont. Code Ann. § 46-15-323, Disclosure by Defendant, provides in relevant part as follows:

(4) The notice must specify for each defense the names and addresses of the persons, other than the defendant, whom the defendant may call as witnesses in support of the defense.

(5) Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses and disclose their reports or statements as required by this section. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list and the witness's report or statement has been disclosed as required by this section, except for good cause shown.

LaDue first challenges the court's ruling by asserting that the underlying factual bases were incorrect. However, the trial court was correct that Tracy testified after LaDue learned of the discussion in the bathroom and that LaDue questioned Tracy about the conversion. Tracy admitted she spoke with Dobb but denied that she had a "story" that was "fixed" because she was truthfully testifying as to what she observed.

LaDue asserts that the conversation at issue took place after Dobb testified so that he was unable to question Dobb about it. (Appellant's Br. at 17.)

However, if that were the case, LaDue should have corrected the court. See Tr. at 442. Since he made no effort to do so, he should not be heard to complain on appeal. State v. Harris, 1999 MT 115, ¶ 32, 294 Mont. 397, 983 P.2d 881 (Supreme Court will not put a district court in error for an action to which the appealing party acquiesced); § 1-3-207 (“Acquiescence in error takes away the right of objecting to it”).

Moreover, the trial court correctly found that Dobb’s and Tracy’s testimony did not substantially differ from statements they gave to police soon after the event. Detective Sergeant St. Pierre testified that he separately interviewed both witnesses on June 12, 1998, eight months prior to the trial.

LaDue cross-examined Dobb about asserted “differences” between her testimony and her statement. Dobb testified that Ah-Mu got “right up in [LaDue’s] face,” with his hands gesturing around his shoulders. (Tr. at 335, 344.) In her statement to police, Dobb apparently said that Au-Mu pointed his finger in LaDue’s face. (Tr. at 344.) Dobb testified that she did not see Ah-Mu grab LaDue around the throat but that Ah-Mu grabbed ahold of his shirt or something and was holding him back. (Tr. at 345.) In her statement to police, Dobb apparently said that Ah-Mu was holding LaDue somewhere around the upper part of his body against the fence. (Tr. at 345.) As demonstrated, Dobb’s statement and her testimony do not deviate in any significant way.

LaDue is also incorrect that Dobb's trial testimony was more prejudicial to him than was her statement to police. Dobb apparently told police that she saw LaDue break loose from Ah-Mu and then LaDue started swinging at him. (Tr. at 348.) However, at the time of trial, Dobb could not recall that observation. (Tr. at 348-49.)

Regina Tracy testified that from her position inside her apartment, she saw two people outside arguing and it appeared that they were about to fight. She went outside and saw that Ah-Mu and LaDue were standing pretty close to each other and Ah-Mu was standing over LaDue. It appeared that LaDue was punching Ah-Mu. She saw blood and saw Rose Lakel come outside. She did not see Ah-Mu raise his hands or attempt to strike LaDue. (Tr. at 353-60.) She testified that she did not recall that Ah-Mu was pointing in LaDue's face. Tracy had apparently told the police eight months earlier that Ah-Mu was pointing in LaDue's face. (Tr. at 363.) Tracy also testified that she did not see LaDue step back from the confrontation, but apparently in her prior statement she had said that at some point LaDue had stepped back. (Tr. at 353-64.) As demonstrated, there is no significant difference between Tracy's statement and her testimony.

LaDue next argues that the State's objections at trial to the addition of the two witnesses were without merit because his paralegal was competent to testify, although her credibility was subject to attack, and because Caroline Skinner was

not subject to the witness exclusion order. (Appellant's Br. at 18-19.) LaDue did not make these specific arguments to the district court and, therefore, he has waived them on appeal. This Court has repeatedly held that a party may not raise an argument for the first time on appeal. State v. Kober, 1999 MT 264, ¶ 11, 56 State Rptr. 1076, 989 P.2d 399. In any case, the reasons argued by the State are irrelevant to this appeal because the district court based its ruling on different grounds. See Tr. at 442. As discussed above, the court found that LaDue was able to cross-examine Tracy about her conversation with Dobb and that Tracy's and Dobb's statements to police and their trial testimony did not differ in any significant way. LaDue failed to show good cause to add witnesses after the trial commenced.

LaDue also asserts on appeal that the court's ruling excluding the additional witnesses' testimony violated his constitutional right to present a complete defense, under the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation Clause of the Sixth Amendment.

(Appellant's Br. at 22-23.) LaDue did not raise this constitutional argument in the district court and therefore he has failed to preserve it for appeal. State v. Huerta, 947 P.2d at 493 (the objection must be specific in order to preserve it for appeal.

A trial objection that is very general in nature and which does not specify what authority, rule, statute, or constitutional provision might be violated by the court's

decision is insufficient to preserve that issue on appeal). LaDue presented an evidentiary issue below and he cannot transform it into a constitutional issue on appeal. Therefore, Chapman v. California, 386 U.S. at 24--which holds that before *federal constitutional error* can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt--is not applicable here. See Appellant's Br. at 20.

Even assuming *arguendo* that the court erred in excluding the evidence, it did not affect LaDue's substantial rights. LaDue asserts he was unable to adequately impeach Dobb's and Tracy's testimony on the issue of whether LaDue stabbed Ah-Mu in self-defense. However, LaDue has failed to sustain his burden of demonstrating how exclusion of the evidence prejudiced him. Under Mont. R. Evid. 103, LaDue was required to make the substance of the evidence known to the court. LaDue's offer of proof consisted of very general statements that in the bathroom, Tracy and Dobb allegedly talked about "fixing their testimony" and "sticking to the story" that LaDue was guilty. (Tr. at 364, 438.) Neither the insignificant "differences" between the statements and testimony nor LaDue's offer of proof is sufficient to establish the requirements of the affirmative defense of self-defense, i.e., that Ah-Mu was the aggressor or that the force LaDue used was reasonable.

Clearly, the force used was unreasonable. Ah-Mu suffered two life-threatening stab wounds in his upper chest and neck. LaDue testified that he intentionally stabbed Ah-Mu twice with the knife, although he said he was aiming for the shoulder. All of the evidence established that Ah-Mu was unarmed. LaDue was not injured during his confrontation with Ah-Mu. State v. Gonzales, 926 P.2d at 711 (the jury reasonably concluded that the force used was excessive where the victim suffered a deep laceration extending the length of his arm, there was evidence that it was a defensive-type injury, and Gonzales was not injured except for a black eye).

Contrary to LaDue's assertion that Dobb and Tracy were "key" eyewitnesses (Appellant's Br. at 19), their testimony was cumulative to that of numerous other witnesses who stated both in their statements to the police and in their trial testimony that Ah-Mu had no weapon, Ah-Mu was not the aggressor, Ah-Mu threw no punches at LaDue, and it did not appear that LaDue was trying to defend himself.

LaDue states that Tracy and Dobb were "critical" because they were portrayed as "objective, neutral, disinterested witnesses to the events." (Appellant's Br. at 24-25.) Contrary to this appeal assertion, however, LaDue argued to the jury that Tracy and Dobb were biased in favor of Ah-Mu and that they disliked LaDue. (Tr. at 514.)

Eyewitness Michael Moore, who was not asserted to be aligned with either side in this case, confirmed that Ah-Mu was not the aggressor and that the force LaDue used was unreasonable. Specifically, Moore testified that Ah-Mu tried to break up the argument between LaDue and Abad. Ah-Mu told LaDue to leave, but LaDue stood his ground and did not try to leave. Moore saw LaDue hit Ah-Mu twice, after which LaDue ran to a car which took off very quickly. Moore testified that he never saw Ah-Mu push or hit LaDue.

Any error in this case was harmless because the evidence of LaDue's guilt was overwhelming. This Court has recently reaffirmed that "the federal harmless error rule and Montana's harmless error rule are essentially the same, and that in either case overwhelming evidence of a defendant's guilt can render harmless a district court's error." City of Missoula v. Robertson, 2000 MT 52, ¶ 46, 57 State Rptr. 250, ___ P.2d ___.

The district court did not abuse its discretion when it denied LaDue's motion to call two additional witnesses, because LaDue failed to demonstrate good cause to add witnesses after the trial had begun. The conversation in the bathroom was not significant because Tracy's and Dobb's trial testimony substantially conformed to their prior statements. Even assuming arguendo that the court erred, LaDue has failed to sustain his burden to show that his substantial rights were prejudiced. The excluded evidence would not establish the requirements for the

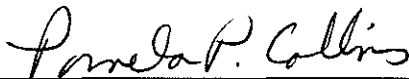
affirmative defense of self-defense because it would not establish that Ah-Mu was the aggressor and that LaDue used reasonable force. LaDue was not deprived of a fair trial by the exclusion of the evidence. The evidence of LaDue's guilt was overwhelming, and therefore any error was harmless.

CONCLUSION

The judgment of conviction must be affirmed.

Respectfully submitted this 24th day of March, 2000.

JOSEPH P. MAZUREK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: 
PAMELA P. COLLINS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
of Respondent to be mailed to:


Mr. William F. Hooks
Attorney at Law
Appellate Defender Office
P.O. Box 200145
Helena, MT 59620-0145

Mr. Robert McCarthy
Silver Bow County Attorney
Mr. Brad Newman
Mr. Samm Cox
Deputy County Attorneys
155 West Granite Street
Butte, MT 59701

DATED: March 24, 2000 Parvula P. Callers

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 8.0 for Windows is not more than 14,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



PAMELA P. COLLINS